No. 80-1048

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. KARLIN, PETITIONER

v.

HANS M. MARK, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the court of appeals erred in upholding the Secretary of the Air Force's denial of his request for a community hardship exemption from military service.

1. In 1970, petitioner was commissioned in the Air Force Reserve under the "Berry Plan,"[1] and accordingly his active

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[1]The Berry Plan is the common name for the Armed Forces Physicians' Appointment and Residency Program. Participation in this nonstatutory program is voluntary. Under the Berry Plan, medical interns who are subject to the draft may be given appointments in the military reserve and permitted to complete their residency training in exchange for agreeing to serve two years of active duty when their residency is completed. See 32 C.F.R. Part 58. Moreover, the Armed Forces will consider requests by Berry Plan doctors for further delay of active duty or exemption from duty.

duty obligation was deferred until the completion of his medical residency training. In 1976, prior to receiving active duty orders, petitioner attempted to resign his commission on the ground that he was conducting essential clinical research in cancer chemotherapy at the University of Chicago Medical School and Hospital. This resignation was treated by the Air Force as a request for deferment on "community essentiality" grounds, pursuant to Air Force Regulation 45-26, para. 23 (Aug. 8, 1975, as amended, Nov. 15, 1976), and Department of Defense Instruction No. 1205.1 (Sept. 27, 1960) (see Pet. 3-5). Concluding that the Air Force's need for petitioner's services outweighed the community need, the Air Force denied the request. Petitioner then sought habeas corpus relief in the United States District Court for the District of Colorado. The district court found that the community's need for petitioner's services outweighed that of the Air Force and it issued the writ. On appeal, the Tenth Circuit reversed, holding that the district court had applied an incorrect standard of review and that the Secretary's decision was not arbitrary. *Karlin* v. *Reed*, 584 F. 2d 365 (1978).

Shortly before the Tenth Circuit's decision, however, on September 1, 1978, petitioner abandoned his job at the University of Chicago and moved to a new position as a gastroenterologist/oncologist at the M.D. Anderson Hospital and Tumor Institute in Houston, Texas. On December 4, 1978, petitioner again sought to resign his commission on community essentiality grounds in light of his new position. On March 16, 1979, the Reserve Medical and Dental Officer Delay and/or Exemption from Active Duty Board denied the request, concluding that the Air Force's need for petitioner's services was greater than that of the community (Pet. App. 14a). The Board relied on information demonstrating the Air Force's urgent need for gastroenterologist/oncologists, particularly at Malcolm Grow USA Medical Center where the Air Force intended to assign petitioner

(*id.* at 15a n.1). This determination was adopted by the Secretary on appeal, and petitioner was ordered to active duty at Malcolm Grow.

Petitioner then filed this habeas corpus petition in the United States District Court for the Southern District of Texas. The court granted the writ (Pet. App. 3a-10a), finding that petitioner's "value to the M.D. Anderson facility and the medical community it serves unquestionably surpasses the value he would have in any other medical environment" (*id.* at 9a). The court of appeals reversed (*id.* at 11a-15a), ruling that the district court has disregarded the Air Force's needs and substituted its own conclusion for that of the Secretary. Because the record contained an adequate basis in fact for the Secretary's determination and that determination was not arbitrary, the court of appeals concluded that it should be upheld.

2. The court of appeals correctly applied the established standard of review of denials of applications for exemption from active duty by Berry Plan doctors on the grounds of community essentiality. These determinations by the Armed Forces may be overturned only if they are determined by the court to be arbitrary. See *Nicholson* v. *Brown*, 599 F. 2d 639 (5th Cir. 1979); *Karlin* v. *Reed*, 584 F. 2d 365 (10th Cir. 1978); *West* v. *Chafee*, 560 F. 2d 942 (8th Cir. 1977); *Roth* v. *Laird*, 446 F. 2d 855 (2d Cir. 1971).[2]

Petitioner presents the question "[w]hether the Due Process Clause requires reasons to be given for denial of administrative claims submitted to the Armed Forces and, if so, what is the test to be applied in such cases." But there can be no objection here that the Air Force violated a duty to

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[2]This test is sometimes couched in terms of whether there is any "basis in fact" in the record for the Secretary's determination. There is no practical difference between these formulations. See *Nicholson* v. *Brown*, *supra*, 599 F. 2d at 646-647 n.8.

disclose the reasons for the denial of petitioner's exemption request. As the court of appeals found (Pet. App. 14a-15a), the record clearly showed the basis for the Air Force's decision—the urgent need for gastroenterologists/oncologists in the Air Force and at Malcolm Grow. See *West* v. *Chafee, supra,* 560 F. 2d at 946.

Petitioner alleges (Pet. 8) that a conflict exists in the circuits "pertaining to Due Process of Law to be accorded to military personnel making administrative claims to the Armed Forces * * *." This contention is without merit. First, the cases cited by petitioner do not involve the denial of community essentiality exemptions. In any event, those cases do not authorize a court to substitute its judgment for that of the Secretary. The cases that have failed to uphold determinations by the Armed Forces did so because the record before the court was inadequate to provide a basis for determining whether the Secretary's determination was arbitrary. See, *e.g., Matlovich* v. *Secretary of the Air Force,* 591 F. 2d 852, 855 (D.C. Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981